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Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 309(j) and 337 of)
the Communications Act of 1934 as Amended)

WT Docket No. 99-87

Promotion of Spectrum Efficient Technologies)
on Certain Part 90 Frequencies)

RM-9332

Establishment of Public Service Radio Pool in)
the Private Mobile Frequencies Below 800 MHz)

To: The Commission

**COMMENTS
OF THE
AMERICAN PETROLEUM INSTITUTE**

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INSTITUTE**

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SUMMARY

The American Petroleum Institute ("API") sympathizes with the Commission's predicament as it wrestles with the many complex, important and potentially wide-reaching issues triggered by the Balanced Budget Act of 1997 ("1997 Act"). Nevertheless, API believes that there are straightforward and obvious answers to at least some of the questions raised by the Commission in this proceeding. First and foremost, while Congress's definition of "public safety radio services" for purposes of the auction exemption may be open to various interpretations, Congress enumerated certain industries in its Conference Report which -- at a bare minimum -- should be included within the exemption. Thus, the Commission need not conduct any protracted analyses to conclude that applicants and licensees in these industries (*i.e.*, pipelines, utilities, railroads and several others) are auction-exempt. Moreover, it is beyond dispute that the petroleum and natural gas industries rely on private, internal radio systems to provide a wide array of "public safety radio services," both on a day-to-day basis and during emergency situations.

Once the Commission determines which entities are auction-exempt, the next step is to devise procedures for providing these entities with continued access to existing spectrum in the bands on which they rely and for allocating spectrum to meet the foreseeable future needs of these entities. The most logical approach is to create separate frequency pools for "public safety radio services," at least in instances where mutual

exclusivity is a potential outcome. API emphasizes that the decision to create a separate pool in a particular band should not be predicated on a determination that "public safety radio services" are the dominant or principal use of the band; instead, spectrum should be set aside for auction-exempt entities in a manner proportionate to their level of existing or foreseeable use in every private radio band.

With respect to the establishment of appropriate licensing schemes for the private radio bands, API believes that neither the 1997 Act nor sound public policy warrants the types of pervasive changes that the Commission seems to envision. As API has explained on prior occasions, geographic area licensing cannot effectively satisfy the unique coverage requirements of many private licensees, including those in the oil and natural gas industries. Accordingly, even if the Commission determines that some private licensees do not provide auction-exempt "public safety radio services," it would not necessarily be spectrum-efficient or in the public interest to impose a geographic licensing scheme on these licensees or the bands that they occupy. Further, if the imposition of geographic licensing were to create mutual exclusivity where none previously existed, the Commission would be acting in direct violation of its statutory obligation to use various means to *avoid* mutual exclusivity. API also strongly urges the Commission *not* to jeopardize or impede the operations of "public safety radio services" providers by: (1) requiring their relocation from existing bands in order to facilitate

geographic area licensing; or (2) imposing any further licensing freezes on private spectrum bands that may subsequently be auctioned.

Finally, although API understands the potential appeal to the Commission of the “Band Manager” concept, it encourages the Commission to move cautiously -- if at all -- in regard to the delegation of its responsibilities as manager of the electromagnetic spectrum. In particular, the Commission must not auction “public safety radio services” spectrum to so-called Band Managers (thereby making an “end run” around the auction exemption) or permit important spectrum allocation and/or assignment decisions to be made by private entities with potential conflicts of interest.

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The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits the following Comments in response to the Commission's *Notice of Proposed Rule Making ("NPRM")*^{1/} in the above-referenced proceeding.^{2/} The *NPRM* requests comment on a host of important issues relating to the

^{1/} 64 Fed. Reg. 23571 (May 3, 1999).

^{2/} By *Order* dated May 19, 1999 (DA 99-950), the Commission extended the Comment deadline in this proceeding from July 2, 1999 to August 2, 1999.

implementation of the Balanced Budget Act of 1997 and, more generally, the assignment and licensing of spectrum in the private and public safety radio services.

I. PRELIMINARY STATEMENT

1. API is a national trade association representing approximately 350 companies involved in all phases of the petroleum and natural gas industries, including exploration, production, refining, marketing, and transportation of petroleum, petroleum products and natural gas. Among its many activities, API acts on behalf of its members as spokesperson before federal and state regulatory agencies. The API Telecommunications Committee is one of the standing committees of the organization's Information Systems Committee. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting telecommunications facilities used in the oil and gas industries.

2. API's Telecommunications Committee is supported and sustained by licensees that are authorized by the Commission to operate, among other telecommunications systems, facilities in the Private Land Mobile Radio Service ("PLMRS") and the Private Operational-Fixed Microwave Service ("POFS"). API's members utilize PLMRS systems, for example, to support the search for and production of oil and natural gas, to ensure the safe pipeline transmission of natural gas, crude oil

and refined petroleum products, to process and refine these energy sources and to facilitate their ultimate delivery to industrial, commercial and residential customers. Likewise, POFS systems serve a variety of vital telecommunications requirements, including communications to remote oil and gas exploration and production sites for voice and data applications, for supervisory control and data acquisition systems, to communicate with refineries and to extend circuits to remote pipeline pump and compressor stations. As discussed in greater detail below, the private radio systems operated by API members are absolutely essential to protecting the safety of life, health and property, both in connection with members' everyday operations and during emergency response incidents.

II. COMMENTS

3. In addition to these individual Comments, API has filed Joint Comments in this proceeding with the Association of American Railroads and the United Telecom Council ("UTC") (hereinafter, the "Critical Infrastructure Industry ('CII') Joint Comments"). Many of API's opinions regarding how the Commission should implement the auction exemption for "public safety radio services" established in the Balanced Budget Act of 1997 ("1997 Act") are set forth in the CII Joint Comments. In its Comments below, API primarily addresses various related and additional issues that were considered beyond the scope of the CII Joint Comments and/or pertain specifically to the oil and natural gas industries.

A. The Private, Internal Radio Services Used by the Oil and Natural Gas Industries Are Auction-Exempt “Public Safety Radio Services”

4. A substantial portion of the *NPRM* is devoted to the basic issue of how the Commission should implement the “public safety radio services” exemption. This exemption is defined to include private internal radio services that are used by non-government entities: (1) to protect the safety of life, health, or property and; (2) are not made commercially available to the public.^{3/} As the Commission recognizes in its *NPRM*, the Conference Report for the 1997 Act further clarifies that this exemption includes “private internal radio services” used by utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments and not-for-profit organizations that offer emergency road services.^{4/}

5. Notwithstanding Congress’s clear direction that the auction exemption for “public safety radio services” encompasses certain *non-governmental* private radio services, the Commission asks in its *NPRM* whether any radio services other than State and local government public safety operations satisfy the criteria of the exemption.^{5/} As emphasized in the CII Joint Comments, the telecommunications facilities employed by critical infrastructure industries such as oil and natural gas companies, electric utilities

^{3/} See 47 U.S.C. § 309(j)(2).

^{4/} See *NPRM* at ¶ 21.

^{5/} See *NPRM* at ¶¶ 26-30.

and railroads clearly provide "public safety radio services" within the meaning of the auction exemption and, thus, should continue to be licensed through means other than competitive bidding. Set forth below is some additional information regarding the important public safety functions served by the private radio systems operated by API members.

6. Natural gas pipeline and petroleum companies use private radio systems for vital internal communications that protect public safety and the environment in connection with all aspects of their operations. Reliable two-way land mobile radio communications (i.e., PLMRS) systems, for example, must be maintained during exploration activities for the direction of personnel and equipment, control and synchronization of multiple geophysical acoustical signal sources for oil and gas exploration, as well as for telemetering geophysical data. Drilling operations, by their very nature, involve hazards that can be minimized with reliable two-way mobile radio communications. After oil and gas production is established, mobile radio continues to play a critical role in providing communications for the management of individual wells, as well as entire fields and pipeline gathering systems, where careful supervision must be maintained according to federal laws over the operation of valves, pumps, compressors, separation equipment, and local gathering systems. The safe and efficient operation of the extensive pipeline gathering systems and long-distance, crude, petroleum products

and natural gas pipelines would not be possible without reliable two-way mobile radio communications.

7. These same types of reliable communications are absolutely necessary in petroleum refineries, where the safety of personnel and adjacent populations, including the surrounding environment, demand clear channels of communication. Even in the marketing and distribution of these energy sources, mobile radio continues to play an important role in the transfer of natural gas at city gates, and the loading and delivery by rail, tank trucks and marine vessels of refined petroleum products to industrial, commercial and residential customers. In short, every manner in which API members utilize PLMRS facilities has an important public safety function. Further, as the end of the 20th Century rapidly approaches, such systems have become a part of many oil and natural gas companies' core contingency plan for the "Year 2000" in the event of a catastrophic breakdown of commercial systems.^{6/}

8. In addition to relying on land mobile radio systems to protect public safety, API members utilize spectrum in other radio services such as the POFS, the Maritime Service and the Aviation Service. POFS systems serve a variety of vital point-to-point and point-to-multipoint telecommunications requirements, including

^{6/} As discussed in Section II.B., below, there are also a number of other reasons why commercial systems cannot and will not satisfy all of the public safety requirements described herein.

communications between remote oil and gas exploration and production sites, for supervisory control and data acquisition ("SCADA") systems, to communicate with refineries, and to extend circuits to remote pipeline pump and compressor stations. All of these functions have a direct impact on public safety. SCADA systems, for instance, are deployed in production fields and along pipelines to monitor and adjust a variety of operating parameters, such as temperature, pressure level and volume. These monitoring functions enable API members to prevent leaks and other emergency response incidents, as well as to minimize the impact of those that do occur. Maritime and Aviation systems operated by API members also enhance public safety by, for example, promoting the safe transport of petroleum products over navigable waterways and facilitating pipeline monitoring efforts by aircraft.

9. It also should be noted that API members are subject to various laws, regulations, codes and standards which *require* them to utilize reliable, redundant and secure communications systems. For example, Department of Transportation ("DOT") regulations and policy governing the transport of hazardous materials require pipeline operators to operate and maintain reliable and secure primary and secondary communications systems. See, generally, 49 C.F.R. §§ 192.615(a)(2), 194.107(d)(1)(ii), 195.401(a), 195.408 and 195.402(c). According to a staff member in DOT's Office of Pipeline Safety, the practical impact of these regulations is that pipeline operators must have primary and backup systems adequate to handle virtually any type of emergency

situation. To most (if not all) pipeline companies, private internal radio systems are a key component of the communications capabilities considered necessary to satisfy this safety requirement.

10. While the importance of emergency preparedness cannot be overemphasized, the public safety functions of the private radio systems operated by API members actually extend far beyond emergency response capabilities. Indeed, these systems protect the safety of life, health and property *every day* by monitoring and controlling conditions that could ultimately result in an accident or other incident if left unattended or unaddressed. Additionally, such systems typically are operated solely for private, internal use by the licensee and are not offered for compensation to the public or any substantial segment thereof.^{2/} API therefore believes that these are precisely the types of "private internal radio services" that Congress intended to exempt from auction as "public safety radio services."

^{2/} As discussed in the CII Joint Comments, some API members and other critical infrastructure entities also operate not-for-profit cost-shared systems -- a spectrum use which should be considered within the scope of the "public safety radio services" exemption.

B. The Commission Should Designate or Create Separate Frequency Pools for "Public Safety Radio Services"

11. The auction exemption for "public safety radio services" will be of little avail to API members and other providers of such services unless the Commission also continues to make both new and existing spectrum bands available to auction-exempt entities. In the CII Joint Comments, API, AAR and UTC concur with the Commission's suggestion that it create a separate frequency pool for auction-exempt "public safety radio services" in the various private radio bands.^{8/} This is particularly important with respect to new allocations that are well-suited to and much needed for "public safety radio service" operations (e.g., Multiple Address System ("MAS") spectrum in the 932/941 MHz band).

12. Although API is encouraged by the Commission's apparent (albeit tentative) support for a "separate pool" approach, API is quite troubled by the manner in which the Commission appears to be implementing this approach thus far in other proceedings. Specifically, in the course of assessing whether spectrum should be made available in either new or existing bands for auction-exempt "public safety radio services," the Commission seems to be leaning toward an "all or nothing" approach in which it looks at a band in its entirety and proposes to designate the band as a whole for "public safety radio services" if the "dominant use" of the band is by auction-exempt

^{8/} See *NPRM* at ¶ 41.

entities or, in the alternative, to auction the entire band if it is not.^{9/} The inherent pitfalls of such an approach are best illustrated by a hypothetical example. Assume, for the sake of argument, that "public safety radio services" constitute approximately 40% of the current or foreseeable operations in each of many different private radio bands, but are not the "dominant use" in any particular band. By the Commission's apparent approach, not a single frequency band or portion thereof would be set aside for "public safety radio services" -- with potentially devastating consequences to human life, health and the natural environment. A far more rational and equitable way in which to implement the "separate pools" concept would be to assign a *proportionate* number of channels or frequencies to "public safety radio services" in every existing band relied upon by auction-exempt entities^{10/} and every new spectrum band for which they are determined to have a need.

13. In considering whether to make spectrum specifically available to auction-exempt entities, the Commission also should recognize that commercial radio services cannot possibly satisfy all of the important public safety functions described in Section II.A., above. While the use of private, internal systems may be supplemented in

^{9/} See, e.g., In the Matter of Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Further Notice of Proposed Rule Making and Order* (released July 1, 1999) (hereinafter "*MAS Further Notice*"), at ¶¶ 19-20.

^{10/} This is essentially what API, UTC and AAR already have proposed with respect to the "refarmed" bands. See Petition for Rule Making, RM-9405 (filed Aug. 14, 1998).

some instances with Commercial Mobile Radio Services ("CMRS") and/or other commercial systems, there remains a very critical requirement for privately-owned and operated two-way mobile and microwave radio systems in the oil and natural gas industries. To minimize the risk of their operations to public safety and the environment, pipeline companies typically require highly reliable radio coverage along their entire pipeline rights-of-way, which, by design, often traverse rural and other sparsely populated areas. While private systems can be licensed and constructed in the precise locations where coverage is needed, commercial systems are not designed to follow pipeline rights-of-way and generally do not serve remote areas; as a result, commercial systems cannot provide the full extent of necessary coverage.

14. Oil and natural gas companies also have experienced difficulties in obtaining from commercial providers all of the particular types of services and equipment that they require. For instance, some CMRS licensees do not offer dispatch service (a necessity along pipeline rights-of-way) or provide such service only at a price that is significantly higher than basic two-way service. Additionally, not all CMRS providers offer the "intrinsically safe" equipment that is required under the Occupational Safety & Health Act to be used in potentially hazardous environments such as oil refineries. Manufacturers of private systems, by contrast, are familiar with these requirements and design equipment that meets all applicable safety standards.

15. Another drawback to commercial systems is that they frequently become incapacitated during emergency conditions (such as natural disasters) due to peak subscriber demand. As a result, private systems are essential in these circumstances to ensure the ongoing safe execution of energy operations where hazardous conditions could develop without reliable communications. Unless the Commission designates specific private spectrum for auction-exempt entities, it will undermine the ability of such entities to meet their safety requirements in a timely and cost-effective manner.

C. API Opposes Geographic Licensing in the Private Radio Bands

16. In addition to seeking comment on how to implement the “public safety radio services” exemption, the *NPRM* raises some general issues regarding the manner in which private radio spectrum should be licensed and assigned. One such issue is the potential use of geographic (rather than site-by-site) licensing.^{11/} As API has explained on prior occasions (and as the Commission seems to recognize in its *NPRM*^{12/}), geographic area licensing is simply not appropriate to meet the specific coverage needs of many private radio users, including oil and natural gas companies. The existing site-by-site licensing approach enables a private licensee to tailor its system to its individual coverage requirements.

^{11/} *NPRM* at ¶ 66.

^{12/} See *NPRM* at ¶ 70,

17. It clearly would be spectrum-inefficient, on the other hand, to grant wide area licenses to private spectrum users that may only need coverage in sparsely populated areas in which other conventional telecommunications services are not available. Put another way, it does not make sense for one licensee to control frequencies that could instead be utilized by several different parties throughout a particular geographic area. Further, if wide-area geographic licensing were adopted, it may, in essence, force private spectrum users to become "subtenants" on spectrum licensed by other parties (e.g., through partitioning and/or disaggregation), resulting in an increase in administrative and operating costs and a decrease in control over their operations. In short, the use of market-based geographic licensing regions such as Economic Areas ("EAs") is appropriate only for licensees that intend to provide service to the public for profit.

18. API also notes that in many private radio bands, including land mobile spectrum both above and below 800 MHz and the 928/952/956 MHz MAS bands, congestion from incumbent operations will render geographic licensing infeasible in many areas. Moreover, API strongly objects to the Commission's suggestion that this problem could be addressed by forcing site-based incumbents in bands that are converted to geographic area licensing to relocate to other spectrum.^{13/} This line of reasoning seems

^{13/} *NPRM* at ¶ 71. In requesting comment on ways in which it might convert existing licensing to geographic licensing, the Commission notes that the American Mobile Telecommunications Association, Inc. ("AMTA") has filed a Petition for Rulemaking proposing to require most Part 90 licensees in the bands between 222 MHz and 896 MHz
(continued...)

to stem from the incorrect assumption that geographic licensing necessarily promotes more efficient spectrum use and, correspondingly, that site-based licensing is spectrum-inefficient. For the reasons described above, however, site-based licensing is actually the *more* efficient approach with respect to API members and other private licensees whose operations do not conform to traditional geographic boundaries. Additionally, relocation is simply impractical given the unavailability of adequate alternative spectrum for the vast number of licensees that would be displaced. Accordingly, the Commission should continue to license non-commercial, private spectrum on a site-by-site basis.^{14/}

D. The Commission Must Seek to Avoid Mutual Exclusivity

19. As the Commission correctly points out, Congress -- in enacting the 1997 Act -- "retained and highlighted" the Commission's obligation under Section 309(j)(6)(E)

^{13/} (...continued)

either to migrate to certain narrowband equipment by a date certain or have their licenses converted to secondary status. *Id.* As API explained in its Reply Comments regarding the AMTA Petition (RM-9332), the near-term forced migration proposed by AMTA would require many API members to invest substantial amounts of money in rebuilding communications systems which have not reached the end of their useful life or are already spectrally efficient. API would not necessarily be opposed, however, to a date certain transition that allowed ample time for the depreciation of existing equipment. In any event, the present proceeding is not the appropriate forum in which to address the band-specific issues raised by the AMTA Petition.

^{14/} API acknowledges that there may be some types of private licensees whose operations would be more amenable to geographic area licensing. In the event that this is shown to be the case, the Commission could make a limited number of private radio frequencies available for these purposes. Under no circumstances, however, should this result in the forced relocation of incumbent site-based licensees.

of the Communications Act of 1934, as amended, to continue to use various means to avoid mutual exclusivity among license applicants.^{15/} API believes that Congress's inclusion of an express reference to this obligation in the general auction authority provision of the 1997 Act means exactly what a plain reading of the statute would suggest -- service unless the Commission first determines that mutually exclusivity cannot be avoided. In other words, the Commission must give prior, independent consideration to its obligation to avoid mutual exclusivity, rather than continuing to weigh this obligation against the "public interest factors" set forth in Section 309(j)(3). Once the Commission has determined that particular spectrum should be auctioned (because mutual exclusivity cannot be avoided and no auction exemption applies), the Commission would then be expected to consider these "public interest factors" in designing appropriate methodologies for the assignment of this spectrum through competitive bidding.

20. Indeed, several members of Congress who are involved in telecommunications matters submitted a letter to the Commission late last year to express their concern that the Commission has been ignoring its obligation to seek to avoid mutual exclusivity.^{16/} API shares this concern and is particularly troubled that (as the letter further states) the Commission seems inclined not only to avoid its obligation under

^{15/} *NPRM* at ¶ 60.

^{16/} A copy of this letter (dated December 22, 1998) is attached hereto as Exhibit A.

Section 309(j)(6)(E) but to turn this obligation on its head by actively creating mutually exclusivity where none exists.^{17/} For instance, in its recently released *MAS Further Notice*, the Commission states its belief that it would be *required* to auction future licenses in the 928/952/956 MHz MAS band on a geographic basis in the event that the dominant use of these bands is not by auction-exempt “public safety radio services.”^{18/} Because these bands presently are subject to prior coordination and site-by-site licensing, mutual exclusivity among applicants is extremely rare. Thus, if the Commission were to impose a geographic licensing scheme in these bands, it would be creating, rather than avoiding, mutual exclusivity, thereby acting in direct contravention of Section 309(j)(6)(E).

E. The “Band Manager” Concept is Potentially Problematic

21. API has several concerns about the potential issuance of “Band Manager” licenses in the private radio bands. To begin with, the Commission does not clarify in its *NPRM* whether it envisions that spectrum relied upon by auction-exempt “public safety radio services” could be assigned in this manner. API believes that if such spectrum were auctioned to so-called “Band Managers” who then would seek to charge the providers of

^{17/} For the reasons set forth in Section II.C., above, API also believes that the imposition of geographic licensing in many private radio bands would not even serve the public interest factors in Section 309(j)(3).

^{18/} *MAS Further Notice* at ¶¶ 20-21.

“public safety radio services” for the use of this spectrum, this would be the functional equivalent of the auctioning of spectrum directly to auction-exempt entities and would, therefore, be a clear violation of both the letter and intent of the exemption. Accordingly, the “Band Manager” concept, if adopted, must be limited to spectrum bands used or designated for entities that are not auction-exempt. Further, under no circumstances should the creation of overlay “Band Manager” licenses in the existing private radio bands (as the Commission suggests could occur) result in the forced relocation of auction-exempt entities or be employed in such a manner that these licensees are unable to modify or expand their existing systems.

22. Another potential problem -- as the Commission identifies in its *NPRM* -- is ensuring fair and nondiscriminatory access by private radio users to any spectrum that is licensed to Band Managers.^{19/} API expects that if the Commission were to auction “Band Manager” licenses for private radio spectrum, the most likely auction winners would be certain of the frequency coordinators presently responsible for coordinating private radio service applications and/or the equipment manufacturers that serve the private radio market. In such event, API envisions that these entities -- although presumably well-intentioned -- would face frequent conflicts of interest in deciding among competing applicants for the scarce commodity that they would control. An equipment manufacturer, for example, likely would have a financial self-interest in

^{19/} *NPRM* at ¶ 93.

providing spectrum to an entity that traditionally has been one of its customers or that is planning to employ a technology or technical standard that is promoted by that manufacturer. To address this problem, API believes that the Commission would need to remain the final arbiter over any disputes that arose concerning equal access to “Band Manager” spectrum. API believes that the Commission also would need to retain ultimate responsibility for ensuring compliance with its various licensing and operational requirements (such as construction deadlines).

F. API Strongly Opposes the Imposition of Any Further Licensing Freezes in The Private Radio Bands

23. With respect to services in which licenses will be assigned by auction for the first time, the Commission seeks comment on measures it should take to prevent speculative licensing activity prior to the adoption of auction rules.^{20/} Two possible approaches suggested by the Commission are: (1) a temporary suspension of the acceptance of applications for new licenses, amendments or major modifications; or (2) interim rules imposing shorter time periods for construction or build-out.^{21/} API believes the second approach is highly preferable to the first. The main problem with a licensing freeze is that it may sweep too broadly, wiping out legitimate as well as speculative uses and even impacting auction-exempt “public safety radio services.” The

^{20/} *NPRM* at ¶ 97.

^{21/} *Id.*

recent MAS freeze imposed by the Commission provides a perfect example. There, the Commission suspended the acceptance of applications for *all* MAS spectrum, including certain bands that the Commission acknowledges may be used, at least in part, for “public safety radio services.”^{22/} Due to this freeze, critical infrastructure entities who rely heavily on MAS spectrum to meet important safety-related requirements must look to less reliable alternatives while the Commission considers whether to auction the spectrum that they so vitally need. API cannot imagine that Congress intended such a result when it enacted the 1997 Act.

24. While API understands that the 1997 Act has presented the Commission with some complex issues, and it appreciates the Commission’s efforts to resolve these issues in a circumspect and deliberate manner with an opportunity for public input, *the Commission simply must not allow all private radio licensing to come to a screeching halt during this potentially lengthy process.* The alternative approach of imposing more stringent construction requirements would deter speculative licensing activity, while allowing private licensees with legitimate (and often safety-related) spectrum needs to continue meeting those needs in an appropriate and effective manner.

^{22/} See *MAS Further Notice* at ¶¶ 20 and 28 (imposing freeze on 928/952/956 MHz MAS bands).

G. API Opposes the Conversion of the 800 MHz Private Land Mobile Radio Service Channels to Commercial SMR Use

25. During the period from July to October 1998, Nextel Communications, Inc. ("Nextel") filed 50 Requests for Waiver of the Commission's rules to facilitate relocation of 800 MHz upper 200 channel incumbent licensees to the Business and Industrial/Land Transportation ("B/ILT") pool frequencies. These upper 200 channel incumbents consist of both private and commercial licensees. In addition, Nextel sought waivers so that it could incorporate B/ILT channels directly into its own commercial SMR systems. Pursuant the intercategory sharing freeze adopted by the Commission in 1995, B/ILT channels were designated solely for private use.

26. API did not oppose the waiver requests as they pertained to B/ILT eligibles. However, in comments filed on November 25, 1998, API did oppose the grant of the waiver requests to the extent that they would allow ineligible upper 200 channel incumbents (i.e., those with commercial operations) and Nextel to use B/ILT pool channels for commercial services. In its comments, API stated that:

In recent years . . . [B/ILT] channels have become increasingly scarce in many areas of the country. As a result, API members and others have faced mounting obstacles to the licensing of the channels needed to meet their important communications requirements. Commercial systems, such as those provided by Nextel, simply do not provide a viable alternative in many instances to the use of private systems, as commercial services

frequently do not offer API members a consistent level of access, reliability and control.^{23/}

27. The Commission announced in a Public Notice dated July 21, 1999,^{24/} that it would incorporate the record gathered in response to Nextel's waiver requests into this docket. The Commission simultaneously released an Order^{25/} in this proceeding, and granted the waiver requests with respect to relocation of the B/ILT pool eligible upper 200 channel incumbents. Regrettably, the Commission also granted the waiver requests for relocation of upper 200 channel incumbents with commercial operations. However, the Commission did deny the waiver requests to the extent that they seek incorporation of B/ILT channels into Nextel's SMR operations, which is the subject of these comments.

28. API is disappointed that the Commission has once again reallocated private spectrum for commercial use; and it is particularly distressing that the Commission sees fit to accomplish this by rule waiver, rather than a rule making proceeding. While API welcomes the decision to deny Nextel's attempt to convert spectrum for its own use by waiver, the Commission must recognize that private wireless

^{23/} API Comments at p. 3.

^{24/} DA 99-1431.

^{25/} *Order*, Nextel Communications, Inc., Requests for Waiver of 47 C.F.R. §§ 90.617(c) and 90.619(b), DA 98-2206 (rel. July 21, 1999).

use of the B/ILT channels must not be further eroded by allowing the commercial use proposed by Nextel.

29. If the Commission continues to allow commercial incursion into the B/ILT pools, it will not be long before private applicants have so few options for new and expanded systems that they will be seriously hampered in their ability to meet critical mobile radio communication requirements. Faced with this situation, entities such as oil and gas pipeline operators would find it increasingly difficult to ensure the safe pipeline transmission of natural gas, crude oil and refined petroleum products, to process and refine these energy sources and to facilitate their ultimate delivery to industrial, commercial and residential customers. API urges the Commission to refrain from reallocating any additional critical and scarce spectrum from private users.

III. CONCLUSION

30. Because the private, internal radio systems employed by the oil and natural gas industries fall squarely within the statutory definition of "public safety radio services" and were specifically identified by Congress (in its Conference Report) as among those industries eligible for the auction exemption, API urges the Commission to confirm that these industries are auction-exempt. API also implores the Commission to take the necessary next step by creating separate frequency pools or set-asides for

auction-exempt entities in every spectrum band relied upon by these entities to any measurable degree and in any new spectrum bands for which these entities are able to demonstrate a need.

31. To the extent that the Commission determines that certain private radio users are *not* auction-exempt, the Commission first must seek to avoid mutual exclusivity among these users, rather than jumping to the conclusion that the spectrum occupied by or designated for these entities must be subject to auction. In this vein, API further cautions the Commission against assuming that geographic licensing is necessarily the most efficient licensing scheme for the bands occupied by private spectrum users, whether or not auction-exempt. Finally, API: (1) has several concerns regarding the Commission's "Band Manager" proposal, including potential conflicts of interest that may be created; and (2) urges the Commission not to stymie all growth in the private radio bands and hamper the development of vital "public safety radio services" by imposing additional licensing freezes while it attempts to sort out the many complex issues triggered by the 1997 Act.

WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing Comments and urges the Federal Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

**THE AMERICAN PETROLEUM
INSTITUTE**

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Dated: August 2, 1999

Congress of the United States
Washington, DC 20515

December 22, 1998

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Kennard:

In August 1993 Congress enacted section 309(j) of the Communications Act of 1934 (47 U.S.C. §309(j)) granting the Commission the authority to utilize competitive bidding to award radio licenses. As part of that law, Congress included paragraph 6(E), which states:

Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings. 47 U.S.C. §309(j)(6)(E).

Since that time we have been concerned that, in both its general spectrum management activities and its implementation of section 309(j), the Commission has frequently ignored this provision of the law. Instead, the Commission has adopted policies resulting in mutual exclusivity that could have been avoided.

Nowhere has this practice been more apparent than with respect to the Commission's treatment of private wireless services.

Our concerns about the Commission's policies were heightened by recent trade press reports indicating that the Commission staff feels their "hands are tied" and that "additional tools for spectrum management" may be needed. See Jeffrey Silva, *Phythyon Confirms FCC Proposal to Auction Private Wireless Spectrum*, RCR News (Nov. 2, 1998). To the extent that these comments are an accurate reflection of the Commission's views, we would like to set the record straight before the Commission releases its *Notice of Proposed Rulemaking* ("NPRM") to address private wireless issues.

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Because we were concerned that the Commission was ignoring its obligations under section 309(j)(6)(E), Congress amended section 309(j) to emphasize the Commission's responsibility to avoid mutual exclusivity whenever possible. Specifically, section 3002 of the Balanced Budget Act of 1997 ("BBA") amended the Commission's general authority to utilize competitive bidding to read as follows.

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection. Pub. L. No. 105-33, §3002 (1997) (emphasis added)

Congress's explanation of this change is unambiguous. While a portion of this section expanded the Commission's authority to utilize competitive bidding, Congress emphasized that the Commission was obligated to consider ways to avoid mutual exclusivity among applicants before conducting an auction. Specifically, the Conferees stated that:

Notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity. H.Rept 105-217, at 572 (1997).

Congress did not engage in an idle act when it legislated this change. It did so for a reason. The Commission must not ignore what Congress enacted by reading this provision out of the law and adopting policies inconsistent with statutory requirements.

In addition to clarifying the Commission's obligations to avoid mutual exclusivity, the BBA also contained provisions that were intended to increase frequencies available for shared or exclusive use of private wireless services. In the explanation of Section 3002(e) of BBA, the Conferees stated their expectation that "the Commission and the NTIA [would] consider the need to allocate additional spectrum for shared or exclusive use by private wireless services in a timely manner." H.Rept 105-217, at 575 (1997) (emphasis added).

The remarks attributed to the Commission staff and reported in the trade press reveal at least two fundamental misunderstandings regarding the BBA amendments to the Communications Act



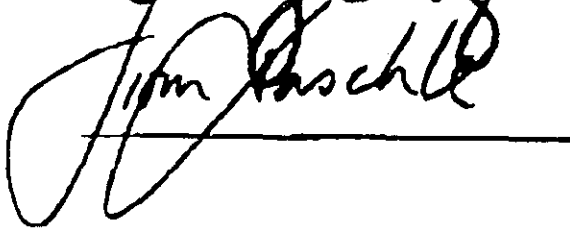
The Honorable William E. Kennard
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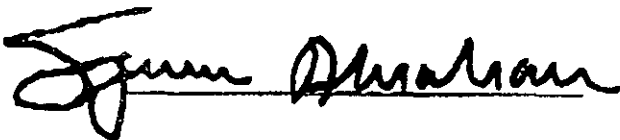
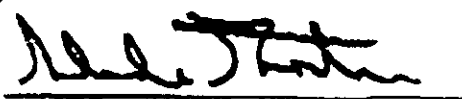
As we noted above, it is our understanding that the Commission will soon release a *NPRM* that will reach tentative conclusions with respect to the private wireless service that are inconsistent with law and the intent of Congress when it passed the BBA. We are troubled by disclosures that the *NPRM* will tentatively conclude that the Commission has no alternative but to utilize competitive bidding. We are equally troubled that the *NPRM* apparently will not propose any additional frequencies for the private wireless service.

In our view, the *NPRM* should be substantially revised before it is issued. In particular, any tentative conclusions on policy should incorporate the Commission's ongoing duty to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings. It should also identify additional frequencies that have the potential to be allocated for private wireless services, consistent with Congress's instructions when the BBA was enacted.

We look forward to hearing from you regarding this important matter.

Sincerely,

CERTIFICATE OF SERVICE

I, Patt Meyer, a legal secretary at the Law firm of Keller and Heckman LLP,
hereby certify that on this 2nd day of August 1999, a copy of the foregoing Comments of
the American Petroleum Institute was sent first-class mail mail, postage prepaid to the
following:

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